Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

No. 07-21

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

No. 07-25

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* THE CONSERVATIVE PARTY OF NEW YORK STATE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indiana statute mandating that those seeking to vote in-person show government issued photo identification violates the First and Fourteenth Amendments.

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INTEREST OF THE *AMICUS*[1]

The Conservative Party of New York State was formed in 1962 to restore a meaningful choice to the voters of New York State. At that time, the three existing political parties espoused a liberal philosophy of the welfare state. In 45 years, the party has grown from a small band of conservative-minded men and women to a statewide organization of almost 170,000 individuals dedicated to the traditional American values of individual freedom, individual responsibility and individual effort.

In the first statewide election in which it participated, the party garnered 141,000 votes; the Conservative Party has twice since then received over 1,000,000 votes for its candidate in a statewide election.

In 1970, James Buckley was elected to the U.S. Senate as a Conservative Party candidate; in 2001 Conservative Party Executive Vice Chairman James P. Molinaro was elected Borough President of Staten Island and was reelected in 2005. In the past 45 years, the Conservative Party has played pivotal rolls in electing state officials, including Governor, Attorney General, United States Senator, State Supreme Court Justices, County Executives, and many local officials. The Conservative Party provided the margin of victory in New York for, among others, President Ronald Reagan, Governor George Pataki, United States Senator Alfonse D'Amato, and Comptroller Ned Regan. The party has also been responsible for the margin of defeat for numerous major party candidates who did not share the Party's

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution to its preparation or submission.

The parties have filed letters consenting to the filing of any *amicus curiae* brief with the Clerk of the Court.

principles and against whom the Conservative Party ran its own candidates. The current state legislature includes 35 State Senators and 48 Assembly Members with Conservative Party designation. The 109th Congress included eight representatives from New York State who hold Conservative designation. Statewide the Conservative Party has forged strong links to Republicans and Democrats of compatible views. *See*, George Marlin, FIGHTING THE GOOD FIGHT: A HISTORY OF THE NEW YORK CONSERVATIVE PARTY (2002).

As the oldest extant and significant "minor" party in a major state, the Conservative Party has a keen and abiding interest in the integrity of the electoral process and in ensuring that legitimate votes are not diluted by voter fraud and other irregularities.

The Conservative Party lacks the resources of the major parties to mount an intensive "get out the vote" effort on election day, and it is thus especially dependent on deterrence of voter fraud to avoid or minimize dilution of the legitimate votes of its supporters.

Amicus submits this brief in support of Respondents' position that the State of Indiana's voter identification requirement and provisional balloting law, Ind. Code §§ 3-10-1-7.2, 3-11-8-25.1 ("Voter ID Law") does not violate the First and Fourteenth Amendments to the United States Constitution.

SUMMARY OF THE ARGUMENT

The Indiana Voter ID law imposes a slight burden only on a relatively small number of potential voters. It is not like other election regulations that the Court has subjected to strict scrutiny, such as poll taxes, requirements of lengthy residence, or property ownership because it does not deny the franchise to an entire class of residents that could not easily, could not at all, achieve eligibility to vote

The Voter ID Law provides for procedural protection of election integrity and should not be subject to strict scrutiny. This Court has held that procedural safeguards are subject to review that balances the State's interest in preventing election fraud against the minor burdens imposed by the law. The Voter ID law does not erect serious barriers to voting that affect large segments of the potential voting population. The State has a compelling interest in preventing voting fraud, specifically the "in person" voting fraud.

The Court's recent voter qualification jurisprudence has adopted a sensible balancing test – weighing the state's interest in ensuring the integrity of its electoral system against the the character and magnitude of the asserted injury. Voting fraud impairs the rights of legitimate voters to vote by diluting their votes, which is an impairment of *their* right to vote, and this interest also must be weighed in the balance. Under this balancing approach, Indiana's Voter ID law serves a compelling state interest in preventing voter fraud, and Indiana has such a compelling interest, and it imposes only a very slight barrier to voting by otherwise eligible voters. Plaintiffs' argument that any burden on the right to vote, however slight or however small the number of voters affected, is not constitutional unless it is shown to serve a "compelling state interest" has been rejected by the Court.

States may, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related

disorder. This is what Indiana has done by adopting its Voter Photo ID law.

Petitioners do not advance any coherent criterion that would permit *any* effective efforts to protect legitimate voters from dilution of their vote, without proof of prior massive voter fraud.

ARGUMENT

THE INDIANA VOTER IDENTIFICATION LAW SHOULD NOT BE SUBJECTED TO "STRICT SCRUTINY" AND DOES NOT CREATE MAJOR BARRIERS TO THE RIGHT TO VOTE OF LARGE NUMBERS OR PARTICULAR CLASSES OF PEOPLE AND IS NOT UNCONSTITUTIONAL

The Indiana voter identification law (the "Voter ID law") at issue requires, with certain exceptions, that persons wanting to vote in person in either a primary or a general election must present a government-issued photo ID at the polling place (*see* Ind.Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1), unless the person either wants to and is eligible to vote by absentee ballot or lives in a nursing home. Ind.Code §§ 3-11-8-25.1(e), 3-11-10-1.2; *see Indiana Democratic Party v. Rokita*, 2006 WL 1005037 (N.D.Ind. Apr. 14, 2006). The Voter ID law's requirement that a person wishing to vote present a government-issued photo ID, such as a passport or a driver's license, is of course no problem for people who have such a document. *Crawford v. Marion County*, 472 F.3d 949, 953 (7th Cir. 2007) Most people do, in fact, have such photo identification; as the Court of Appeals noted, it is virtually impossible to accomplish many ordinary tasks without either a driver's license or the equivalent. People who vote by absentee ballot (and anyone 65 or over or who lives in a nursing home can vote by absentee ballot) do not need to produce photo identification to vote. Non-driver's license identification is free

to voters, and indigents needing to pay a fee for a birth certificate to obtain identification are exempt from the Voter ID Law. Ind. Code § 3-11.7-5-2.5(c).[2]

The Voter ID law imposes a slight burden only on a relatively small number of potential voters, and affects only on a very small percentage of the state's population.[3] Evidence of this minimal impact includes the fact that none of the Petitioners has identified a single member of its organization or a single constituent who was unable to vote because of the Indiana Voter ID Law. *See Crawford v. Marion County*, 472 F.3d 949, 951-52. This belies Petitioners' claim that the challenged law imposes a "severe burden" on large numbers of would-be voters and their accusations of discrimination, whether racial, class or political, and it supports Respondents' contention that the Voter ID law is narrowly tailored.

The Voter ID Law is unlike other election regulations that the Court has subjected to strict scrutiny, such as poll taxes, requirements of lengthy residence, or property ownership. The

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[2] Individuals who do not have photo IDs and must vote in person (*e.g.* because they don't live in nursing homes and are ineligible to cast absentee ballots) can get a photo ID from the Indiana motor vehicle bureau by presenting their birth certificate (or certificate of naturalization if they were born outside the United States) or a certified copy, plus a document that has their name and address on it, such as a utility bill. Anyone who does not have a photo ID at the time he or she goes to the polls can, if challenged, cast a provisional ballot and then has 10 days either to file an affidavit of indigency or to produce a photo ID. Ind.Code §§ 3-11.7-5-2.5, 3-11-8-23, 3-11-8-25.1. (*See* 472 F.3d at 950)

[3] The Voter ID Law minimizes the risk of deterring legitimate voters by providing for availability of free identification documents, exemption for absentee voters and most senior citizens, and accommodations for indigents and religious objectors. *See* Ind. Code § 3-11.7-5-2.5.

Indiana law, unlike a poll tax, does not create high barriers to poor people or, as in the case of poll taxes in Southern states, people of a particular race.[4] The Court has distinguished between such substantive voter qualifications and procedural safeguards. The former are suspect because they deny the franchise to an entire class of residents that could not easily, or could not at all, achieve eligibility to vote. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966); *Harman v. Forssennius*, 380 U.S. 528, 541 (1965). Procedural safeguards, such as advance registration requirements, establish reasonable election protocols and are relatively easily satisfied by those who wish to vote. The Voter ID Law provides procedural protection of election integrity and should not be subject to strict scrutiny. This Court has held that procedural safeguard requirements are subject to review that balances the State's interest in preventing election fraud against the minor burdens imposed by the law.

Petitioners' allege that the effect of requiring a photo ID in preventing otherwise eligible voters from exercising their franchise weighs heavily against the Voter ID law. However, that effect, the record below shows, and Respondents amply demonstrate in their brief, is slight. The principal evidence on which the Petitioners rely to show that many voters would be disenfranchised was found by the district judge as the trier of fact to be "totally unreliable" because of a number of methodological flaws, and the Court of Appeals on *de novo* review accepted that finding. (472 F.3d 949, 953)

On the other side, the State has a compelling interest in preventing voting fraud, specifically the "in person" voting fraud in which a person shows up at the polls claiming to be someone

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[4] Petitioners compare the Voter ID Law to poll taxes, and make the *reductio ad absurdum* argument that any law requiring a voter to have a document constitutes a poll tax. ACLU Brief at 36; Democratic Party Brief at 31-32.

else – *e.g.* someone who has left the district, or who has recently died, or someone who has not voted yet on that election day. Without photo ID, there is little chance of preventing this kind of fraud because poll workers are unlikely to scrutinize signatures carefully and probably untrained in recognizing handwriting irregularities. (472 F.3d 949, 953) The purpose of the Indiana law is to reduce voting fraud, which impairs the rights of legitimate voters to vote by diluting their votes, which is an impairment of *their* right to vote. This Court recently held that states have a compelling interest in preventing voter fraud. *Purcell v. Gonzalez*, ___ U.S. ___, 127 S.Ct. 5, 6-7 (2006) (voter identification laws "prevent[] voter fraud").

Plaintiffs' argument that any burden on the right to vote, however slight or however small the number of voters affected, is not constitutional unless it is shown to serve a "compelling state interest" was rejected in cases decided after the cases on which they rely. A voting regulation is not suspect merely because it requires some effort on the part of citizens in order to exercise their right to vote. *Clingman v. Beaver*, 544 U.S. 581 at 593 (2005); *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973). In *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992), the Court noted that "election laws will invariably impose some burden upon individual voters . . . . [T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." In *Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983), the Court recognized the need to "consider the character and magnitude of the asserted injury."

Indiana has a compelling interest in preventing voter fraud, protecting the right to vote and to have all votes that are properly cast (and only those votes) counted. *See Purcell v. Gonzalez*, 127 S.Ct. 5, 7 (2006) (per curiam) (voter identification laws serve to avert "'debasement or dilution of the weight of a citizen's

vote'"). "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433; *see also Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("To deem ordinary and widespread burdens . . . severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections . . . .")

Petitioners' argument for strict scrutiny is premised largely on the contention that the Voter ID law discriminates against minorities, the poor, the elderly, non-drivers, urban residents, and Democrats. The evidence in the record does not support these assertions, as State Respondents demonstrate in great detail, Petitioners' own submissions refute them. (State Respondents' Brief at 30-42)[5,6]

Petitioners argue that the Voter ID Law imposes a "severe burden" on voting because it "departs from usual and customary

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[5] The data show no likely negative disparate impact on minorities or low-income citizens and that 99% of Indiana's voting age population already possess photo identification, which alone renders untenable Petitioners' claims of discrimination and proves the insignificance of any burdens the Law imposes; the only study of voter patterns since adoption of the Voter ID law shows no disparate impact on the groups Petitioners claim are adversely affected. *See* State Respondents Brief at 8, 32-33.

[6] Much of the "data" proffered by Petitioners and the *amici* supporting Petitioners is not in the record and could not be subjected to the usual tests of credibility, and the "examples" of adverse impact on particular voters are not in the record, are unsworn, and also could not be subjected to any test of credibility. *See, e.g.*, Brief of Asian American Legal Defense and Education Fund, Brief for Former and Current Secretaries of State. Those date and anecdotes should be not be given weight by the Court.

regulations adopted elsewhere." Dem.Br. 29; ACLU Br. 45. Verifying voter identity is an essential and long-standing criterion for the right to vote. Petitioners do not explain why the requirement to provide photo ID is significantly more burdensome than providing other customary forms of identification. The only fee involved is incidental to obtaining what 99% of voters already have[7] – a valid driver's license.[8] *Harper*, 383 U.S. at 666-68.

The problem in New York State is far from trivial. According to Lee Daghlian, an official spokesman for the New York State Board of Elections, no one checks if the person registering to vote is a citizen. That greatly concerns New York State election officials, who processed 245,000 voter registrations at Department of Motor Vehicle offices in 2006 year under the "Motor Voter" law[9]. New York State *Democratic* Assemblywoman Ginny Fields notes that the state's "Board of Elections has no voter police" and that the state probably has upwards of 500,000 illegal immigrants old enough to drive. Both Daghlian and Fields are quoted in John Fund, "This Will Make Voter Fraud Easier," *Opinion Journal*, November 2, 2007, http://www.opinionjournal.com/diary/?id=110010814.; see also Shaun Marie Levine, Executive Director of the Conservative Party of New York State, "Statement by the NYS Conservative Party at the New York State Assembly Public Hearing on Governor Spitzer's Proposal to Issue Drivers Licenses to Illegal

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[7] Petitioners concede as much. Democratic Party Brief 12; ACLU Brief 12.

[8] The United States is one of the few countries in the world that does not require every adult to carry a government-issued photo ID. Driver's licenses fill this need, and they have become a nationally accepted form of identification.

[9] National Voter Registration Act of 1993, ("Motor Voter Act"), Pub.L. 103-31, 42 U.S.C. § 1973gg, *et seq*.

Aliens," October 25, 2007, www.cpnys.org/index_files/Statement_on_Drivers_Licenses_to_Illegal_Aliens_102507_Assembly.doc.

Petitioners do not advance any coherent criterion that would permit *any* effective efforts to protect legitimate voters from dilution of their vote, without proof of prior massive voter fraud. Of course, by then it would be too late – at least one election will have been "stolen." States can surely, as with any criminal offense or civil wrong, take reasonable prophylactic measures to protect the integrity of the electoral process. The Court has repeatedly confirmed that States have a compelling interest in protecting public confidence in the legitimacy of the electoral process. As the Court unanimously acknowledged in *Purcell v. Gonzalez*, __ U.S. __, 127 S.Ct. 5, 7 (2006), "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."

It is beyond question 'that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.'" *Clingman v. Beaver*, 544 U.S. 581, 593, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005), quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *see also Anderson v. Celebrezze, supra*, 460 U.S. at 788. In *Rosario v. Rockefeller*, 410 U.S. 752, 775, the Court distinguished inherently suspect voter qualification laws, such as laws disenfranchising soldiers, creating special electorates, and imposing durational residency requirements, from fraud prevention procedures. The Indiana has done by adopting its Voter Photo ID law is a voter fraud prevention and passes Constitutional scrutiny..

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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